Supreme Court, U.S.
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No. 92-116

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

SOCIETY OF SEPARATIONISTS, INC., et al.
. . . . . Petitioners,

v.

GUY HERMAN, JUDGE OF THE TRAVIS COUNTY PROBATE COURT #1, et al.
. . . . . Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an atheist individual, who refused to make a non-religious affirmation to tell the truth when answering questions during jury service qualification, has standing to seek prospective declaratory relief against the then presiding judge on Free Exercise and/or Equal Protection grounds, either as an individual or as a class representative and/or as a coplaintiff with an atheist association?

LIST OF ALL PARTIES

ROBIN MURRAY-O'HAIR, and
SOCIETY OF SEPARATIONISTS, INC.,
Petitioners and Plaintiffs/Appellants below;

The HONORABLE GUY HERMAN, Judge
Travis County Probate Court #1,
Respondent and Defendant/Appellee below; and

The HONORABLE DAN MORALES, Attorney General
for the state of Texas,
Intervenor in the Court of Appeals.

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OPINIONS BELOW

On November 19, 1990, the United States District Court for the Western District of Texas, granted summary judgment in favor of Defendant/Respondent and against Plaintiffs/Petitioners. Society of Separationists, Inc. v. Herman, No. A-89-CA-1021, (W.D. Tex. Nov. 19, 1990).

A panel of the Court of Appeals for the Fifth Circuit awarded declaratory relief in favor of Plaintiffs/Petitioners against Defendant/Respondent on August 28, 1991. Society of Separationists, Inc. v. Herman 939 F.2d 1224 (5th Cir. 1991).

On April 17, 1992, the Fifth Circuit, on rehearing en banc, overruled the panel decision previously issued, holding that the individual Plaintiff/Petitioner as well as the associational Plaintiff/Petitioner lacked standing to bring the action. Society of Separationists, Inc. v. Herman, 959 F.2d 1283 (5th Cir. 1992).

JURISDICTION

Petitioners have attempted to invoke the certiorari jurisdiction of this Court pursuant to 28 U.S.C. Section 1254. However, it is Respondent's contention that the en banc decision of United States Court of Appeals for the Fifth Circuit decided a question of federal law which has been well settled by this Court and which in no way conflicts the applicable decisions of this Court.

STATEMENT OF THE CASE

Proceedings and Disposition in the Courts Below:

Petitioners, an individual and atheist organization filed suit on November 16, 1989, seeking preliminary and permanent injunctive relief, a declaratory judgment and damages against Guy Herman, Probate Judge of Travis County, Texas and other Travis County Defendants alleging specifically that the Defendants violated Petitioners Free Exercise rights. Petitioners suit was not brought nor ever certified as a class action. In fact, the District Court dismissed the associational Plaintiff. The District Court ruled for the Defendants on every issue and further held that all named Defendants were immune or not amenable to suit.

The United States District Court for the Fifth Circuit held that all named Defendants except for Judge Guy Herman were properly dismissed by the District Court but reversed that Court's dismissal of the associational Plaintiff. The Fifth Circuit panel then issued declaratory relief in favor of Petitioners and against Judge Herman.

Subsequently, on November 1, 1991, the Fifth Circuit ordered the case reconsidered en banc. As a result, on April 17, 1992, the Fifth Circuit, en banc, after receiving written briefs from both sides on the issue of the standing, overruled the prior panel decision, holding that the individual Petitioner lacked standing to seek prospective declaratory relief and that the associational Petitioner lacked associational standing.

Statement of Facts

Petitioner Murray-O'Hair was summoned to the Travis County Courthouse for jury duty along with a number of other citizens. When the group of prospective jurors of which Petitioner Murray-O'Hair was a member was asked to rise to take the statutorily required juror oath, Petitioner Murray-O'Hair objected to the oath on the grounds that she was an atheist. She was then called to the bench by Judge Herman, who inquired as to her refusal to take the oath. After stating her objections, Petitioner Murray-O'Hair was immediately offered an opportunity to make an affirmation. She refused to make an affirmation as well.

After the other jurors were sworn in, Petitioner Murray-O'Hair again appeared before Judge Herman, who made further inquiries about her refusal to take an affirmation. The judge again offered an affirmation, assuring her that the affirmation he was offering would be " ... without any recognition or any statement, any reference to God or anything of that nature ... ." Record Excerpt, Transcript of Contempt Hearing, p.3, 11.3-5. Her response was: "I cannot affirm, sir. That is just as religious as an oath," Id. at 11.7-8, and, later, "An affirmation, my understanding, is a religious statement." Record Excerpt, Transcript of Contempt Hearing, p.4, 11.1-2.

After repeatedly offering to allow Petitioner Murray-O'Hair to make a non-religious affirmation, after explaining that the law required her to make an oath or an affirmation in order to qualify for jury duty, after warning

her that if she refused to make either " ... an oath or an affirmation, ... " Id. at p.3, 1,12, she would be held in contempt of court, and after receiving nothing in response other than unqualified refusals to make either an oath or an affirmation, Judge Herman finally held Petitioner Murray-O'Hair in contempt of court and ordered her detained in the Travis County Jail. Petitioner Murray-O'Hair was released on bond approximately six (6) hours later and Judge Herman reduced her contempt sentence to time served. Subsequently, as a result of the forgoing incident, Petitioners filed this action.

SUMMARY OF ARGUMENT

Regardless of how broad and sweeping an effect the Petitioners would like their lawsuit to have on the Travis County jury system and the State of Texas, the fact remains that the only parties involved in this lawsuit are the Petitioner, Robin Murray-O'Hair, along with her co-Petitioner, the non-certified class, Society of Separationists, Inc., and the sole Respondent, Guy Herman, Presiding Judge, Probate Court Number One, Travis County, Texas. And despite how unconstitutional Petitioners assert that Rules 226 and 236 of the Texas Rules of Civil Procedure are along with the way in which they are implemented by the Travis County jury system, the only substantive issue asserted by Petitioners, in this action, is whether or not Judge Herman violated Murray-O'Hair's Free Exercise and/or Equal Protection rights by holding her in contempt for refusing to make a non-religious affirmation during jury service qualification.

Focusing on these simple yet key facts surrounding this litigation, the United States Court of Appeals for the Fifth Circuit, en banc concluded that Petitioners did not have standing to seek prospective declaratory relief against Respondent, Judge Herman.

Respondent argues that the Fifth Circuit correctly held that pursuant to Article III of the United States Constitution and this Court's decisions regarding and interpreting the same, Petitioners lack standing to bring this action. Specifically, Respondent asserts that there is no conceivable declaratory remedy available for Petitioners which would alter Respondent Judge Herman's behavior

towards Petitioner Murray-O'Hair. This is so because Petitioner suffers no continuing harm and has only demonstrated a conjectural or hypothetical threat of future injury stemming from Respondent Herman's conduct in 1987.

Additionally, Respondent asserts that the Fifth Circuit correctly held that Society of Separationists lacks associational standing according to this Court's decision in Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977).

ARGUMENT

Introduction

The Petition for Writ of Certiorari should be denied because the en banc decision of the Fifth Circuit, holding that Petitioners lack standing to seek prospective declaratory relief against Respondent Herman, in no way conflicts with the well settled decisions of this Court on the issue of standing.

Article III of the United States Constitution limits the jurisdiction of the federal courts to determining actual cases or controversies. Allen v. Wright, 468 U.S. 737 (1984). Part and parcel of the Article III, 'actual case or controversy' requirement is the rule that a litigant must have standing to invoke the power of the federal courts. Id. at 750.

The doctrine of standing has been repeatedly defined by this Court as, "the requirement that a plaintiff allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." County of Riverside v. McLaughlin, ____ U.S. ____, 111 S.Ct. (1991); *citing* Allen v. Wright, 468 U.S. 737 (1982); *citing* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982).

Due to the constraints imposed by Article III, Petitioners, Murray-O'Hair and Society of Separationists, do not have standing to seek declaratory relief. This is so because in actuality what Petitioners seek is an advisory opinion.

The lack of standing for Petitioner Murray-O'Hair and Petitioner Society of Separationists will be addressed separately in this brief.

Individual Standing

When making a standing inquiry, judicial examination of the plaintiff's complaint is necessary. Such an inquiry should include identifying the parties, the issues involved and the type of relief sought. One factor to be considered is whether or not the prospect of obtaining relief from the injury as a result of a favorable ruling is too speculative? Allen v. Wright, 468 U.S. at 753.

An examination of Petitioner's complaint shows that she, as an individual, and the Society of Separationists (the purported class which never obtained class certification under Rule 23, Federal Rules Civil Procedure) are seeking prospective declaratory relief against Respondent Judge Herman on the basis that he violated her Free Exercise and/or Equal Protection rights by holding her in contempt when she refused to make a non-religious affirmation during jury service qualification. Neither Travis County, Texas nor the State of Texas is a party to this action.[1]

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[1]In Petitioner's original complaint, Travis County, Texas, was named as a co-defendant but was dismissed by the District Court on grounds that Petitioners never established that her injury occurred pursuant to some policy or custom which represents the official policy of Travis County. The Court found that, Petitioner never pointed to any policy statement, ordinance, regulation, or other officially adopted decision by Travis County which was the moving force behind the deprivation she alleges. Nor did Petitioner identify another Travis County trial judge who may have held other jurors in contempt for

The constitutionally of Rules 226, Oath to Jury Panel, and 236, Oath to Jury, of the Texas Rules of Civil Procedure was never challenged by Petitioner's in their complaint.

When a plaintiff is seeking injunctive relief for a past exposure to illegal conduct, the plaintiff must show that she suffers continuing harm or a real and immediate threat of repeated injury in the future unless declaratory relief is granted. City of Los Angeles v. Lyons, 461 U.S. 95 (1983).

According to the Lyons decision, Petitioner lacks standing to obtain prospective declaratory relief. Petitioner does not suffer a continuing harm as a result of Judge Herman's actions. Nor can Petitioner show that she will in the future appear before Judge Herman as a prospective juror and that Judge Herman will exclude her from jury service and jail her for contempt. In fact, it would be a very remote possibility that Petitioner and Judge Herman would find themselves back in this situation with one another in the future. There are over one half million residents in Travis County and twenty six judges of varying types. Furthermore, Judge Herman's regular duties no longer include overseeing the jury qualification process. Therefore, although it is possible even probable,

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refusing to take a juror's oath. Moreover, Petitioner never asserted that Judge Herman was a policy maker for Travis County. Society of Separationists, Inc. v. Herman, No. A-89-CA-1021, slip op. at 9 (W.D. Tex. Nov. 19, 1990). See Monell v. New York Department of Social Services, 436 U.S. 658 (1978). The dismissal of defendant Travis County was affirmed by both the panel and en banc decisions of the Fifth Circuit. Society of Separationists v. Herman, 939 F.2d 1224 (Fifth Cir. 1991); Society of Separationists, Inc. v. Herman, 959 F.2d 1283 (Fifth Cir. 1992).

that at some point in Respondent's life she might be called for jury duty again, it is highly unlikely that she would appear before Judge Herman for jury impaneling, assuming that Judge Herman remained a judge of some sort in Travis County for the remainder of Petitioner's life. Clearly, based on the facts of this case, the only threat of future injury Petitioner can demonstrate is one that is purely conjectural, hypothetical and in no way immediate. *See* Lujan v. Defenders of Wildlife, ____ U.S. ____, 112 S.Ct. 2130 (1992); Golden v. Zwickler 394 U.S. 103 (1969).

It is apparent that based on this Court's decision in Rhodes v. Stewart, 488 U.S. 1 (1988), Petitioner is actually seeking an advisory opinion and not a declaratory judgment. As this Court stated, "The real value of a judicial pronouncement--what makes it a proper judicial resolution of a case or controversy rather than an advisory opinion--is the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*. Rhodes v. Stewart, 488 U.S. at 202, *citing* Hewitt v. Helms, 482 U.S. 755 (1987) (emphasis in original). Even if Petitioner in this case, received a favorable declaratory judgment it would not affect the behavior of Judge Herman towards her.

In her petition for Writ of Certiorari, Petitioner incorrectly relies on Carter v. Jury Commission of Greene County, 396 U.S. 320 (1970) and County of Riverside v. McLaughlin, ____ U.S. ____, 111 S.Ct. 1161 (1991), in support of her argument that she has standing to seek declaratory relief. This case is entirely different from Carter and County of Riverside. This is so because unlike this case, the plaintiffs in Carter obtained class certification

and sued, alleged and proved that the County Jury Commission deliberately and systematically excluded blacks from Greene County juries. Whereas, in this case, class certification was never obtained and the only Defendant/Respondent is an individual. Likewise, in County of Riverside, the class certified plaintiffs, demonstrated the existence of a continuing harm as a result of the County's official policy of not providing probable cause determinations within thirty-six (36) hours of arrest. Petitioner has not shown that Judge Herman continuously and systematically excludes atheists from serving on juries nor has she demonstrated that she suffers a continuing harm as a result of her non-participation in jury duty in 1987.

Instead, Petitioner Murray-O'Hair, like the petitioner in City of Los Angeles v. Lyons, complains of one single incident which has altogether ceased before the filing of her complaint and therefore has no standing.

Petitioner also incorrectly relies on the line of cases coming from this Court which address the issue of juror exclusion on account race. Petitioner attempts to classify herself as an "excluded juror." To the contrary, Petitioner was not excluded from the jury, but refused to participate in the jury selection process by refusing to make a non-religious affirmation to tell the truth when answering voir dire questions. Petitioner wholly differs from the jurors in Powers v. Ohio, ____ U.S. ____, 111 S.Ct. 1364 (1991); Edmonson v. Leesville Concrete Co., ___ U.S. ___, 111 S.Ct. 2077 (1991); Georgia v. McCollum, No. 91-372, ___ U.S. _____ (1992) (decided June 18, 1992), who were excluded from jury duty solely on account of race.

Furthermore, assuming arguendo, that Petitioner is considered to be an "excluded juror," her reliance on Powers v. Ohio, Edmonson v. Leesville Concrete Co., and Georgia v. McCollum, is still misplaced. The Powers, Edmonson, and Georgia decisions held that when a prospective juror is struck by the use of a racially based peremptory challenge, then that juror's Equal Protection rights have been violated. Petitioner misinterprets those decisions to mean that an Equal Protection violation equals standing. That is not correct. In fact, this Court specifically noted in Powers v. Ohio, that a potential juror has daunting standing problems when seeking declaratory relief for an equal protection violation which was caused by the exercise of a racially based peremptory challenge. This is so because it is difficult for an individual juror to show a likelihood that discrimination will reoccur at the voir dire stage. Id. at 1373. Without evidence of a systematic practice, an excluded juror lacks standing to seek prospective relief.

Associational Standing

In Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977), this Court held that,

> An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations purpose; and (c) neither the

> claim asserted nor the relief requested requires participation of individual members in the lawsuit.

The Society of Separationists does not meet the first and third requirements of the Hunt test.

The Associational Petitioner has not demonstrated that its members would otherwise have standing to sue in their own right. Remembering that Judge Herman is the only respondent in this case, the other Society members have not suffered any injury from the dismissal of Murray-O'Hair from the venire in 1987. Just because other Society members may agree with Murray-O'Hair's opinion regarding the oath or affirmation requirement, that is not sufficient to therefrom conclude that they have suffered actual injury. Warth v. Seldin, 422 U.S. 490 (1975). Therefore, since the other Society members have not suffered any injury, the Society does not have standing.

The Society also lacks standing under the Hunt test because their complaint requires the participation of individual members. The Society's complaint does not challenge the constitutionality of Rules 226 and 236 of the Texas Rules of Civil Procedure. Travis County, Texas, and the State of Texas are not parties to this suit. The Society complains of Judge Herman's actions in this isolated incident. The basis of the Society's complaint is a single episode between Murray-O'Hair and Judge Herman in December of 1987. Without Murray-O'Hair's participation, there would be no lawsuit. If Murray-O'Hair never appeared before Judge Herman, and if the

subsequent exchange between Murray-O'Hair and Judge Herman never took place, no lawsuit would exist.

Petitioners, disregarding the requirements of the Hunt test, assert, in support of their associational standing argument that this suit and Murray v. Travis County District Court, No. 89-1463 (5th Cir. Feb. 26, 1990), *cert. denied*, ____ U.S. ____ 111 S.Ct. 75 (1991), shows that Travis County has pattern of coercing potential jurors to make a religious statement and excluding them if they do not. This assertion is irrelevant and not compelling. First of all, Travis County is not a Respondent to this action. Judge Herman is the only named Respondent in this suit. Petitioners failed long ago to present any proof or establish that the alleged injury was the result of a policy or custom representing the official policy of Travis County. Secondly, other than Petitioner Murray-O'Hair, the Society is only able to point to one other unnamed individual who, they assert, was held in contempt for refusing to participate in the jury selection process. This is insufficient to establish a systematic exclusion of atheists and falls far short from establishing that the members of the Society have suffered actual injury.[2]

The fact the Society lacks standing under the Hunt test, is also consistent with the holding of Harris v. McRae, 448 U.S. 297 (1980), in which this Court held that a Free Exercise claim is one that ordinarily requires individual

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[2]In fact, Petitioners submitted only one affidavit of another individual, Keith Hailey, who refused to use the word affirm during jury service qualification. However, Mr. Hailey's affidavit did not indicate whether he was a member of the Society or not.

participation. Here, as in Harris, individual participation of the Society's members is essential for a proper understanding and resolution of their Free Exercise claims. Petitioners have only made a general assertion in their complaint they speak for their members. Yet, the Society never submitted any evidence indicating how many of its member's share Petitioner's view regarding the nature of an affirmation nor how any of its members were injured and in what way, by the dismissal of Murray-O'Hair from the venire.

Recently, this Court held that, the elements of standing "are not mere pleading requirements but rather an indispensable part of plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, ie., with the manner and degree of evidence required at the successive stages of the litigation." Lujan v. Defenders of Wildlife, 112 S.Ct. at 2130. Thus, under Lujan, it is clear that Petitioners fall far short of establishing the elements of standing.

The Society of Separationists was never certified as a class because it failed to meet the prerequisites for obtaining class certification under Rule 23, Federal Rules of Civil Procedure. Specifically, the Society presented no evidence that the class of individuals is so numerous that that joinder of all members would be impracticable.[3] The Society is a national organization of atheists. Yet, in light of its nationwide status, the Society failed to present any

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[3]Society of Separationists, Inc. v. Herman, No. A-89-CA-1021, slip at 5.

evidence of how the issue in the lawsuit, which involves a Travis County Judge following a rule of state procedure, contains a question of law common to the nationwide class or how the out of state members are in need of having their rights protected through Murray-O'Hair's complaint. Instead of setting forth facts showing that the Society meets the requirements for class certification under Rule 23, the Petitioners simply made a vague assertion contained in their original complaint, purporting to represent "All individuals eligible for jury service who have deep seated convictions against mouthing any religious dogma as a condition to jury service."

Furthermore, there is no evidence in the record that other Society members even share Murray-O'Hair's opinion regarding the religious nature of an affirmation. In this case, the Society does not represent a certifiable class of similarly situated individuals and there is no real and immediate threat to such a class.

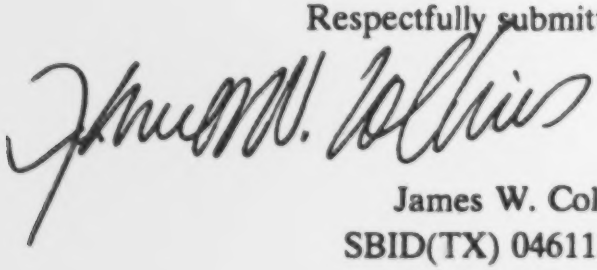
Yet, even if the Society does represent a certifiable class of similarly situated individuals, the Society would have to demonstrate that a case or controversy actually existed at the time the complaint was filed. County of Riverside v. McLaughlin, 111 S.Ct. at 1667. In this case, the alleged unlawful conduct by Judge Herman wholly subsided by the time Petitioners' complaint was filed.

Conclusion

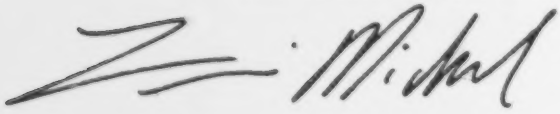
As demonstrated above, the en banc decision of the Fifth Circuit, holding that Petitioners lack standing to seek prospective declaratory relief against Respondent Herman

is consistent with the well settled decisions of this Court. Therefore, no need exists for this Court to review the en banc decision of the Fifth Circuit and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

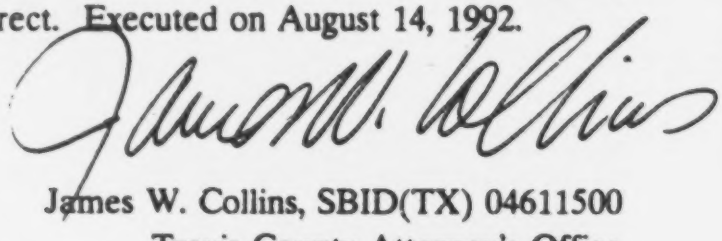
I, James W. Collins, hereby certify that I have mailed copies of the foregoing Brief in Opposition to a Petition for Writ of Certiorari to:

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I certify under penalty of perjury that the foregoing is true and correct. Executed on August 14, 1992.



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